

**BEFORE THE
PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2022-_____**

SPECTRUM SOUTHEAST, LLC,)	
)	
Complainant,)	PETITION TO DETERMINE
)	JUST AND REASONABLE
v.)	TERMS AND CONDITIONS FOR
)	POLE ATTACHMENT
YORK ELECTRIC COOPERATIVE,)	AGREEMENT PURSUANT TO
INC.,)	S.C. CODE ANN. § 58-9-3030.
)	
Respondent.)	
)	

Pursuant to the South Carolina Broadband Accessibility Act, S.C. Code Ann. § 58-9-3000, *et seq.*, and the Rules and Regulations of the Public Service Commission of South Carolina (“Commission”), including Rule 103-825 thereof, Spectrum Southeast, LLC (“Charter”), files this Petition to challenge the unlawful clearance requirements that Respondent York Electric Cooperative, Inc. (“York”), has sought to impose on it under a new pole attachment agreement. In support of this Petition, Charter alleges as follows:

INTRODUCTION

1. In this Petition, Charter asks the Commission to answer a limited, but critical legal question under South Carolina’s recently adopted Broadband Accessibility Act (“BAA”) – whether an electric cooperative pole owner may deny access to its poles based on construction requirements that exceed those of the National Electric Safety Code

(“NESC”).¹ Charter believes the answer to this question is “no,” based on the express language of the BAA.

2. South Carolina passed the BAA to address the serious lack of broadband service in rural South Carolina. S.C. Code Ann. § 58-9-3000. Indeed, the Federal Communications Commission (“FCC”) estimates 650,000 South Carolinians do not have access to broadband internet.² The COVID-19 pandemic only highlighted the need for broadband, as South Carolina saw “higher demands for virtual education and telemedicine, as well as more people working from home.”³

3. As a result, South Carolina moved swiftly to invest billions of dollars to expand access to broadband service through the BAA. S.C. Code Ann. § 58-9-3000. In passing the BAA, Representative Cezar McKnight noted, “[t]he future economic success of this state is directly linked to how much access to broadband we have in South Carolina.”⁴ As Governor McMaster observed, the BAA “is going to have ramifications for years . . . [t]his is just going to make it a little bit closer, in terms of education, in terms of medicine, in terms of business – this is going to open things up.”⁵ In addition to the

¹ As explained in further detail below, the NESC is the nationally-recognized, industry standard governing the safe installation, maintenance, and operation of overhead electric and communications lines.

² Joseph Bustos, *Legislators Aim To Get More SC Residents Access By Passing Broadband Bill*, THE STATE (Sept. 24, 2020), <https://amp.thestate.com/news/politics-government/article245959505.html>.

³ *Id.*

⁴ *Supra* note 2; see S.C. Code Ann. § 58-9-3000 (recognizing “the lack of broadband facilities in certain areas deprives citizens residing in those areas from access to opportunities”).

⁵ Bobby Bryant, *Broadband Plan Could Plug In Entire Pee Dee*, NEWS AND PRESS (Nov. 25, 2020), <https://www.newsandpress.net/broadband-plan-could-plug-in-entire-pee-dee/>.

financial investments, the state leaders also recognized the need to establish regulatory policies that would serve to enable and incentivize further broadband deployment. Senator Luke Rankin explained, “[o]ur goal is to try to incentivize capital investment in the state by defining payment for those who are not in the business, (and) who would want to access poles that are existing to run wire, instead of burying cable.”⁶

4. This dispute arises under the auspices of the BAA and out of Charter’s effort to negotiate a new pole attachment agreement with York to provide broadband service to South Carolina, on just and reasonable rates, terms, and conditions, in compliance with the BAA. *See* S.C. Code Ann. § 58-9-3030 (providing that electric cooperatives “must offer just, reasonable, and nondiscriminatory rates, fees, charges, terms, and conditions” for pole attachments). As discussed in detail below, the BAA’s text expressly provides that pole owners may not exceed the requirements of the NESC, pursuant to an attacher’s request for access. Indeed, a contrary interpretation would frustrate the General Assembly’s clear intent and undermine the statute’s overriding policy objective: “promot[ing] the efficient deployment of broadband facilities” and “facilitating access to broadband services in unserved areas throughout the State.” *Id.* § 58-9-3000(7) and (9).

5. For decades, Charter and its predecessors-in-interest have relied on access to York’s poles to provide communications services to South Carolina residents and businesses throughout the utility’s service area. Up until South Carolina passed the BAA, York could demand any contract term as a condition of access – including unreasonable clearance requirements – and Charter had little choice but to accept them with little (if any)

⁶ *Supra* note 2.

negotiation. The parties' current agreement was signed in 2004 with a term of three years, and has renewed automatically every year thereafter.

6. After South Carolina enacted the BAA to promote timely and efficient broadband deployment, particularly in rural areas, Charter sought to negotiate a new pole attachment agreement with York that reflected the statute's important provisions that ensure Charter's access to poles on just and reasonable terms. An agreement based on the BAA's reasonable new legal requirements is particularly critical for Charter as it actively undertakes to expand its broadband network to currently unserved areas of South Carolina in accordance with the FCC's Rural Digital Opportunity Fund ("RDOF") program and various state and local broadband deployment awards in South Carolina that contain specified timeframes to complete construction.⁷

⁷ Charter's ability reasonably to resolve whether a pole owner may impose clearance requirements that exceed the NESC may impact Charter's ability to implement other South Carolina programs designed to spur broadband in rural and underserved areas. For example, Charter has established broadband deployment agreements including locally funded construction subsidies with Florence, Darlington, Cherokee, Spartanburg, and Dillon counties to provide broadband to more than 10,000 South Carolinians in the next year and half to three years. Charter is also investing \$250 million in South Carolina broadband buildout, in addition to the \$112 million it obtained in RDOF support. Charter Communications, *A \$362 Million Initiative To Expand Broadband Availability to Unserved South Carolina Homes and Small Businesses* (Mar. 3, 2021), <https://policy.charter.com/RDOF-South-Carolina-Initiative>; see also *Spectrum Brings Its State-Of-The-Art Network With Gigabit Broadband And New TV Choices To York County*, WHO'S ON THE MOVE (May 4, 2022), <https://whosonthemove.com/spectrum-brings-its-state-of-the-art-network-with-gigabit-broadband-and-new-tv-choices-to-york-county/> (noting Charter aims to bring service to nearly 6,000 homes and small businesses in York by the end of the year). As noted by South Carolina's lawmakers, "investment from Charter will help our state . . . bring high-speed connectivity to thousands of previously unserved residents – supporting their educational and economic success." *Id.* (quoting Senate Finance Committee Chairman Hugh Leatherman). "The long-term impact of Charter's expansion will be transformational." *Id.* But in order for Charter to meet its buildout goals, it must have just and reasonable access to poles.

7. In the context of South Carolina's new broadband policy framework, over the course of approximately six months, the parties were able to reach tentative agreement on nearly all provisions of a new agreement, including the annual rental rate, pole access timeframes and processes, pole replacement cost allocation, overloading, inspections, and dispute resolution protocols, among other areas.

8. Unfortunately, the parties' negotiations ultimately reached an impasse over York's insistence that Charter attach its cables at 84 inches – or 7 feet – below York's neutral conductors, while also maintaining a mid-span clearance over the ground of 18 feet. The typical clearances, based on the NESC, are far less, as described below. In response, and despite Charter's strong, contrary interpretation of the statute, as a means to prevent any further delay and to accommodate York's request, Charter offered a business resolution to this dispute: Charter told York it would agree to its 84-inch clearance requirement provided that York did not require Charter to pay any necessary make ready costs to achieve that clearance. But at that point, York refused to negotiate any further, demanding that Charter either accept its construction requirements or York would walk away from the negotiations and all the other terms the parties had negotiated and agreed to.

9. York's clearance requirements are directly at odds with the BAA's express language, which prohibits a pole owner from denying access where it is "not prohibited by the National Electric Safety Code." S.C. Code Ann. § 58-9-3030(A). The NESC, which, as its name suggests, sets forth *the* national standards for safe electrical and communications construction on poles, requires that the clearance between the electrical neutral and the closest communications facility on the pole at 40 (*not 84*) inches, and mid-span clearance over the ground at 15.5 (*not 18*) feet. York's imposition of requirements

far in excess of the NESC flout the state's law, cannot be based on any reasonable need for safety or sound engineering, and make it much more time consuming and costly for Charter to access York's poles for broadband deployment.

10. The consequences of York's deviation from the NESC are no mere technical matter presenting only theoretical problems. Allowing York to apply its excessive clearance requirements would effectively operate to unreasonably deny Charter access to York's poles and thereby subvert the policy goals of the BAA – to facilitate and promote fast and efficient broadband deployment in unserved areas that remain without adequate broadband. In fact, if York is permitted to impose these excessive and unreasonable requirements, Charter would not be able to access York's poles as intended by the BAA: in a cost-effective and efficient manner. The application of these extreme construction standards could force Charter to pay to replace more of York's poles than would otherwise be necessary under the NESC standards, dramatically raising Charter's cost of deployment, and causing significant delays in accessing poles and deploying broadband services.⁸ If Charter cannot access poles on a timely and cost-effective basis, it may have no reasonable means by which to deploy broadband to the unserved South Carolinians.⁹

⁸ By demanding clearance standards well in excess of NESC requirements, York is seeking a financial windfall in the form of significant pole infrastructure improvements at the expense of timely and efficient broadband infrastructure deployment (it takes much more time to replace a pole than it takes to merely rearrange facilities on poles to make room for a new attachment). This unnecessary requirement and result is precisely what the BAA was designed to combat. *See* S.C. Code Ann. 58-9-3030(A) ("An electric cooperative shall provide communications service providers . . . with nondiscriminatory access in offering or granting rights to install or attach any attached facilities . . . and must offer just, reasonable, and nondiscriminatory rates, fees, charges, terms and conditions").

⁹ In some instances, Charter may be able to use underground construction in lieu of attaching its facilities to poles. But underground construction is considerably more expensive (generally three times as much), may require additional permitting (*e.g.*, from governmental authorities) and an environmental review, takes longer to complete, and most

11. To address York’s inappropriate conduct, and ensure that other similarly-situated electric cooperatives do not obstruct or delay broadband deployment through the imposition of excessive and unlawful clearance requirements, the Commission should affirm that the clear language of the statute prevents pole owners from denying attachment rights where Charter seeks to access poles in compliance with the NESC. While Charter believes that the BAA’s access standard involving the NESC is evident based on the unambiguous statutory language, and furthers the statute’s purpose, a clear determination from the Commission on this legal point will resolve this dispute, and allow Charter to deploy broadband in a timely and cost-effective matter, as envisioned by the BAA. In addition, such a determination will provide much needed guidance to other pole owners and attachers regarding appropriate pole attachment terms and conditions under the BAA, particularly with regard to which construction standards are legal and appropriate.

PARTIES

12. Charter is a franchised cable operator under federal law, 47 U.S.C. § 522(5), and a communications service provider under state law, S.C. Code Ann. §§ 58-9-3010(8) & 58-9-2610(B). Charter provides communications services – cable, video, mobile, broadband internet access, and digital voice – to residents and businesses across South Carolina. To provide its services in a cost-effective and timely manner, Charter must attach

importantly, is not an option in certain situations because of geographic conditions (involving soil or rock) and environmental restrictions, such as prohibitions against soil disruption and wetland regulations. *See, e.g.,* Joseph Bustos, *Legislators Aim To Get More SC Residents Access By Passing Broadband Bill*, THE STATE (Sept. 24, 2020), <https://amp.thestate.com/news/politics-government/article245959505.html> (Senator Rankin explaining “[r]unning lines underground could take longer to achieve and is more expensive for telecom companies”).

its facilities to existing utility poles in South Carolina, including poles owned by York and other electric cooperatives.¹⁰

13. Charter is a Delaware limited liability company with its principal headquarters 400 Washington Street, Stamford, Connecticut, 06901. Its authorized representatives in this proceeding, to whom all notices, pleadings, correspondence, and other documents relating to this proceeding should be directed, are:

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14. Charter consents to electronic service in this proceeding.

15. Respondent York Electric Cooperative, Inc., is an electric cooperative organized in South Carolina that operates under the provisions of Title 33, Chapter 49 of the South Carolina Code of Laws. *See* S.C. Code Ann. § 58-9-3010(10). York owns or

¹⁰ Charter's affiliate, CCO Holdings, LLC, was the entity that received federal Rural Digital Opportunity Fund ("RDOF") funding for South Carolina. Charter itself is also a party to a number of state and local broadband deployment agreements and is the owner of the facilities and the entity tasked with entering any necessary pole agreements, as well as building out and operating RDOF-supported facilities.

controls poles in the areas where it provides service in South Carolina, including in the counties of Cherokee, Chester, Lancaster, and York. York's principal office is located at 1385 East Alexander Love Highway, P.O. Box 150, York, South Carolina 29745.

JURISDICTION

16. The Commission has jurisdiction over this matter. Pursuant to Section 58-9-3030(A)(2) of the BAA, a communications service provider and electric cooperative "must negotiate in good faith for at least sixty days" after a written request by the communications service provider to negotiate a pole attachment agreement. If the parties' negotiations are unsuccessful, "either party may petition the commission to determine just and reasonable rates, terms, and conditions for the agreements." S.C. Code Ann. § 58-9-3030(A)(2); *see also id.* § 58-9-3030(F). The Commission must make its determination within 180 days of the filing of the petition. *Id.* § 58-9-3030(A)(2).

17. On October 11, 2021, Charter sent York a written request to negotiate a new pole attachment agreement pursuant to S.C. Code Ann. § 58-9-3030(A)(2). *See* Exhibit ("Exh.") A.

18. The parties subsequently negotiated for six months – far more than the required sixty days – during which time they were able to reach agreement on all issues but one. *See* Exh. B (Email correspondence between C. McDonald, P. Werner, and A. Shanedling regarding pole attachment agreement negotiations). Their negotiations ultimately reached an impasse when York demanded Charter comply with York's excessive and unlawful clearance requirements, in exchange for an agreement, and refused to accept a reasonable compromise. *See id.* (stating "York has conditionally agreed to make concessions sufficient to satisfy every item on your list except clearances"). If

Charter refused to accept that term, York also threatened it would walk away from the negotiating table and take all of the other agreed terms with it.

19. Faced with this impossible choice – agree to an unlawful term in a new agreement that undermines its reliance on the BAA to timely and efficiently deploy broadband in rural areas of the state *or* live with an agreement entered before the BAA was even enacted – Charter now respectfully brings this Petition for relief. Charter therefore specifically requests the Commission to determine just and reasonable rates, terms, and conditions to govern “the attachment or placement of facilities, after the date of [Charter’s] written request, by [Charter] on or in the existing or new poles or structures of the electric cooperative,” York. *See* S.C. Code Ann. § 58-9-3030(A)(2).

20. In doing so, Charter asks the Commission to resolve a single, disputed legal issue and confirm that a pole owner may not, as York has insisted, deny an attacher access to its poles by imposing any construction standard that exceeds the NESC.

BACKGROUND

South Carolina Law And Policy Promote Timely And Efficient Broadband Deployment

21. Broadband providers must, of necessity, rely on existing utility poles like those owned and operated by York to construct and operate their broadband networks. Indeed, it is impractical (and in many cases impossible) and contrary to public policy to allow more than one set of poles in the public right of way.¹¹

¹¹ *See, e.g., supra* n. 9; *So. Co. v. FCC*, 293 F.3d 1338, 1341 (11th Cir. 2002) (“As a practical matter, cable companies have had little choice but to” attach “their distribution cables to utility poles owned and maintained by power and telephone companies” because the cost of constructing a new system is “insurmountable”); *see also FCC v. Florida Power Corp.*, 480 U.S. 245, 247 (1987) (observing, “[c]able television operators, in order to deliver television signals to their subscribers, must have a physical carrier for the cable; in

22. Because access to these poles is essential to a broadband provider's ability to construct, operate, and expand its network, pole owners, like York, which have exclusive ownership and control over these critical assets, hold virtually all of the bargaining power when negotiating pole attachment agreement rates, terms, and conditions,¹² especially prior to passage of the BAA when South Carolina cooperatives were not subject to any pole regulation. In the absence of regulation, pole owners historically have abused their "superior bargaining power" to impose unreasonable rates, terms, and conditions on communications providers for access to essential pole facilities.¹³

23. Courts, legislative bodies, and administrative agencies have long acknowledged – and sought to remediate – this imbalance of negotiating power between pole owners and attachers, by passing laws and regulations. Without such regulations, the pole owner's leverage in negotiations can undermine important public policies of

most instances, underground installation of the necessary cables is impossible and impractical. Utility compan[ies'] poles provide, under such circumstances, virtually the only practical medium for the installation of television cables"); *Ga. Power Co. v. Teleport Commc'ns Atlanta, Inc.*, 346 F.3d 1033, 1036 (11th Cir. 2003) (noting "lack of alternatives to these existing poles"); *So. Co. Servs., Inc. v. FCC*, 313 F.3d 574, 576-77 (D.C. Cir. 2002) ("Since building new poles was prohibitively expensive, cable operators instead leased existing space from utilities . . .").

¹² See, e.g., *TCA Management Co. et al. v. Southwestern Public Service Company*, 10 FCC Rcd. 11832, ¶ 15 (1995) ("In enacting Section 224 [the federal Pole Attachment Act], Congress recognized the utilities' superior bargaining power in pole attachment matters.").

¹³ *Heritage Cablevision Assocs. of Dallas, L.P. v. Tex. Utils. Elec. Co.*, 6 FCC Rcd. 7099, ¶ 14 (1991) (When passing the federal Pole Attachment Act, "Congress was concerned with abusive conduct by the utilities. For example, the relevant Senate report refers to testimony received in committee concerning: 'the local monopoly in ownership or control of poles' by the utilities; the 'superior bargaining position' enjoyed by utilities over cable operators in negotiating rates, terms and conditions for pole attachments; and allegations of 'exorbitant rental fees and other unfair terms' demanded by the utilities in return for the right to lease pole space. As the Senate report and case law bear out, Congress clearly acted to protect cable operators from anticompetitive conduct by utilities.") (internal citation omitted)).

increasing deployment of advanced communications services and the vast social welfare benefits they unlock.¹⁴

24. The passage of the BAA demonstrates the South Carolina General Assembly similarly recognized that electric cooperatives have exercised their superior bargaining power over attachers in ways that have impeded efficient broadband deployment and undermined the welfare of the state. *See* S.C. Code Ann. § 58-9-3030(A). The BAA addresses this problem directly and in no uncertain terms when it states that “[a]n electric cooperative . . . must offer just, reasonable, and nondiscriminatory rates, fees, charges, terms, and conditions for [pole attachments] to communications service providers.” *Id.*; *see also* S.C. Code Ann. § 58-9-3000(B)(3) (stating with the passage of the BAA, “the General Assembly intends to . . . ensur[e] that appropriate protections are in place to ensure that electric cooperative do not have an unfair competitive advantage over other broadband service providers”).

25. Those mandated just and reasonable rates, terms, and conditions include, among other things, compliance with the FCC’s access timeframes and other access requirements, which are incorporated into the BAA. *See id.* § 58-9-3030(B)(1) (citing 47 C.F.R. § 1.1411). Including these timeframes in the BAA represents a clear effort by the General Assembly to reduce the time and expense for making pole attachments in South Carolina.¹⁵

¹⁴ *See, e.g., So. Co. v. FCC*, 293 F.3d at 1341 (explaining “Congress recognized, however, that utilities would lose the incentive to voluntarily enter into pole attachment agreements with telecommunications and cable television companies that were now their competitors. Congress thus added a ‘nondiscriminatory access’ provision to the Pole Attachments Act,” reflecting “Congress’s decision to regulate this relationship”).

¹⁵ *See In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Inv.*, 33 FCC Rcd. 7705 (2018) (revising 47 C.F.R. § 1.1411 “to

26. The BAA also prohibits utilities from denying access based on construction standards that exceed the NESC, which is the subject matter of the instant case. Specifically, the BAA requires electric cooperatives to allow access to their poles when “not prohibited by the National Electric Safety Code.” *Id.* § 58-9-3030(A)(1); *see also id.* 58-9-3030(D)(2) (requiring an electric cooperative and pole attacher “to fully comply with [NESC] requirements for electric infrastructure attachments”). Mandating a uniform NESC standard for pole attachments is both consistent with the plain language of the BAA and furthers the statute’s clear intent to promote speed, efficiency, and fairness to facilitate broadband deployment in rural areas. *Id.* § 58-9-3000(B)(4) (explaining broadband “development is vital and necessary to induce, create, and promote industrial and economic development and to create job opportunities, enhance health care, and enhance educational advancement in the State”).¹⁶

27. Under the BAA, if parties cannot reach agreement following a 60-day negotiation period, they may petition the Commission, which has authority to resolve disputes over pole attachment rates, terms, and conditions. *Id.* § 58-9-3030(A)(2).

promote broadband deployment by speeding the process and reducing the costs of attaching new facilities to utility poles”).

¹⁶ *See also* Jeffrey Collins, *Roads, Broadband Part of SC House’s \$1.8B COVID Relief Plan*, ASSOCIATED PRESS (Feb. 16, 2022), <https://www.usnews.com/news/best-states/south-carolina/articles/2022-02-16/roads-broadband-part-of-sc-houses-1-8b-covid-relief-plan?msclkid=f6c4af68c7d111ec846a01f572428620> (stating South Carolina has set aside \$400 million “for expanding broadband internet into rural areas”); Joseph Bustos, *Legislators Aim To Get More SC Residents Access By Passing Broadband Bill*, THE STATE (Sept. 24, 2020), <https://amp.thestate.com/news/politics-government/article245959505.html> (Luke Rankin, R-Horry, explaining “[o]ur goal is to try to incentivize capital investment in the state by defining payment for those who are not in the business, (and) who would want to access poles that are existing to run wire, instead of burying cable”).

28. In exercising this new jurisdiction and authority, the Commission “must make such determination within one hundred eighty days of the filing of the petition for that determination and the commission’s determination must apply retroactively to all facilities attached or placed between the date of the written request to negotiate and the date of the commission’s determination.” *Id.*

***The NESC Provides The Industry Standards For
Safe Utility Pole Construction***

29. The NESC is the nationally-recognized, industry standard governing the safe installation, maintenance, and operation of overhead and underground electric supply and communications lines.¹⁷ This view is shared by the South Carolina Supreme Court. *See Foreman v. Atl. Land Corp.*, 245 S.E.2d 609, 610 (S.C. 1978) (“While [the NESC] has no legislative sanction, it is difficult to conceive a better test of care than compliance with its provisions”).¹⁸ This view is also shared by the South Carolina Department of Transportation (“SCDOT”), which mandates that utility infrastructure within SCDOT rights-of-way conform with NESC construction standards. *See SCDOT Utilities Accommodation Manual* (Mar. 2019) at ¶ 6.2 (providing that “[e]lectric power and

¹⁷ INSTITUTE OF ELECTRICAL AND ELECTRONICS ENGINEERS, INC., NATIONAL ELECTRICAL SAFETY CODE 1 (2017 ed. 2016) (stating “NESC rules are globally recognized and intended to provide a practical standard of safe practices that can be adopted by public utilities, state or local utility commissions or public service commissions, or other boards or bodies having control over safe practices employed in the design, installation, operation, and maintenance of electric supply, communications, street and area lighting, signal, or railroad utility facilities”).

¹⁸ The BAA gives the NESC the “legislative sanction” that the South Carolina Supreme Court noted was lacking in the *Foreman* case at the time the opinion was issued. Thus, it is reasonable to assume that South Carolina’s Supreme Court, if confronted with the application of the NESC to pole attachments under the BAA, would have even stronger grounds to find that compliance with its provisions is the appropriate standard for pole attachments.

communications facilities *shall conform to the [NESC], latest edition*” within SCDOT rights-of-way) (emphasis added)). Among other things, the NESC sets forth specific clearance standards for the safe and proper construction of electric and communications facilities.¹⁹

30. Because the NESC provides industry standards for safe construction on poles – a fact recognized by both the South Carolina Supreme Court and SCDOT – the General Assembly sensibly and appropriately adopted the NESC as its safety standard, and incorporated it expressly into the BAA. *See* S.C. Code Ann. §§ 58-9-3030(A)(1), 58-9-3030(D)(2) & 58-9-3010(4). Specifically, Section 58-9-3030(A) of the BAA states that a pole attacher’s right of access “includes the right to nondiscriminatory use of all easements and rights of way and to all poles, ducts, conduits *to the extent not prohibited by the National Electric Safety Code.*” *Id.* § 58-9-3030(A)(1) (emphasis added). In other words, an attacher has a positive statutory right to access a pole unless doing so is not possible under the NESC.

31. Reinforcing that express right, the BAA further provides that “[a] communications service provider that has attached, or applied to attach, facilities on electric cooperative infrastructure . . . must cooperate with the owner of the pole and all other attaching entities in good faith *to fully comply with National Electric Safety Code*

¹⁹ INSTITUTE OF ELECTRICAL AND ELECTRONICS ENGINEERS, INC., NATIONAL ELECTRICAL SAFETY CODE Tables 235-5 & 232-1 (2017 ed. 2016) (permitting communications cable attachments 40 inches from [electric] neutral conductor and requiring mid-span clearance of 15.5-16 feet above the ground); *see id.* at 160 (stating the limited and specific instances in which vertical clearances greater than those provided in Table 235-5 are required); *see also* DAVID J. MARNE, P.E., NATIONAL ELECTRICAL SAFETY CODE 2017 HANDBOOK 273 & 210 (Michael McCabe et al. eds., 2017).

requirements for electric infrastructure attachments.” Id. § 58-9-3030(D)(2) (emphasis added).

32. In the same vein, the BAA even defines “Broadband Network” with specific reference to the NESC:

“Broadband network” means any and all infrastructure, equipment, materials, or component parts thereof that may be used to provide landline or wireless broadband service, whether now existing or that may be developed in the future including, but not limited to, wires; cables, including fiber optic and copper cables; conduits *to the extent not prohibited by the National Electric Safety Code*; antennas; equipment; fixtures; switching multiplexers; poles; routers; switches; servers; appurtenances; facilities; or other equipment, whether ancillary, auxiliary, or otherwise used to facilitate the provision of landline or wireless broadband service.

Id. § 58-9-3010(4) (emphasis added).

33. The General Assembly’s intent with its express references to the NESC could not be clearer: the BAA prohibits an electric cooperative from denying access to its poles if an attachment can safely be installed in compliance with NESC standards. Nowhere does the BAA remotely imply that electric cooperatives are free to impose safety or engineering standards other than those mandated by the NESC.

34. That silence is telling. If the General Assembly intended to permit electric cooperatives to have discretion to impose rules that exceed the NESC, it could and would have done so expressly.²⁰ But the General Assembly did not. That decision must be understood as intentional, and the words the General Assembly actually used must be given

²⁰ Unlike the General Assembly, other states have passed laws and regulations that allow pole owners to supplement the NESC with their own standards. *See, e.g.,* Ark. Pub. Serv. Comm’n Pole Attachment Rules, R. 3.01(a)(1) (requiring attachers to install and maintain attachments in compliance with “[t]he current edition of the NESC and NEC in effect at the time of construction and the Pole Owner’s applicable engineering standards related to safety and reliability in effect at the time of construction”).

their plain and ordinary meaning. *See Aiken v. S.C. Dep't of Revenue*, 839 S.E.2d 96, 99 (S.C. 2020) (“What the General Assembly says in the text of the statute is the best evidence of its intent.”) (citing *Hodges v. Rainey*, 533 S.E.2d 578, 581 (S.C. 2000)); *McGill v. Univ. of S.C.*, 423 S.E.2d 109, 111 (S.C. 1992) (“[I]n construing a statute its words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation.”). The BAA’s statutory meaning is clear: electric cooperatives may not deny access to a pole when an attachment can be made in compliance with the NESC, not any other standard. In other words, an attacher has a right to attach to a pole *unless* the attachment would be *prohibited* by application of the NESC.

35. The General Assembly’s decision to allow access “where not prohibited by the NESC” makes sense and promotes the goals of the BAA. The NESC provides objective, well established, and industry-accepted rules to ensure communications facilities are constructed and maintained safely. If electric cooperatives were permitted to impose shifting, arbitrary, excessive, and even anticompetitive standards on attachers, those standards could, as this case makes clear, deter and needlessly increase the costs of broadband deployment – in direct conflict with the important public policies animating the BAA.

***During Negotiations For A New Pole Attachment Agreement,
York Demanded That Charter Agree To Construction Standards That Exceed The
NESC In Violation Of The BAA***

36. Charter and its predecessors in interest have relied on access to poles owned by York to deliver communications services for many decades. Today, Charter is attached to approximately 4,000 poles owned and controlled by York.

37. Charter's ability to efficiently and effectively deploy its network is critically dependent on reasonable pole attachment rates, terms, and conditions. Non-uniform, discriminatory, and excessive construction standards can radically increase the time and costs of deployment, impacting an attacher's (like Charter's) decision on if, how, where, and when to expand its broadband network.

38. On October 11, 2021, Charter wrote to York requesting negotiation of a new pole attachment agreement. Exh. A. Charter explained that the parties' existing agreement, which was signed by the parties in 2004 for an initial term of three years and automatically renewed each year thereafter, was outdated and did not comply with the newly-adopted BAA in critical respects.

39. In response to Charter's written request, the parties negotiated over the next six months, and were able to reach tentative agreement on all of the pertinent rates, terms, and conditions. For example, the parties agreed on an annual, per-pole attachment rate, access timeframes and other access process requirements, key definitions (such as make ready costs), allocation of pole replacement costs, and processes for overloading, inspections, and dispute resolution. *See* Exh. B.

40. But the parties failed to agree on a critical issue that is the subject matter of this dispute: whether York was legally permitted to impose on Charter construction standards that exceed the NESC if the application of those standards would result in unreasonable access denials and/or make-ready costs. In other words, if Charter's access to a York pole would be possible under the NESC, but not under York's heightened standards, is York legally permitted to apply those excessive standards?

41. York sought to require Charter to attach its cables 84 inches below the electrical neutral, and maintain a mid-span clearance over the ground of 18 feet, even though the NESC only requires Charter to attach 40 inches from primary neutral conductors and only 15.5 - 16 feet above the ground. *See* Inst. of Elec. & Electronics Eng'rs, Inc., *National Electric Safety Code*® at Tables 232-1 and 235-5 (2017 ed.).

42. Charter could not agree to York's excessive clearance requirements because they violate the BAA, which expressly prohibits utilities from denying pole access except where access would not be possible under the NESC. The imposition of York's standards would inevitably lead to more poles needing to be replaced (which Charter would be required to pay for) or outright denial of pole attachment permit applications, even when access was clearly allowed under NESC rules.

43. York's excessive clearance requirements also undermine the core purpose of the BAA: to promote timely and efficient deployment of broadband. If York were allowed to impose its excessive requirements, Charter could be forced to underground its facilities, which as discussed above, is typically much costlier, time-consuming, and less efficient than aerial deployment. In many situations, undergrounding facilities is not even reasonably available.²¹ Application of these standards would also prevent Charter from enjoying its rights under the BAA on just and reasonable rates, terms and conditions.

44. The Commission should declare, based on the plain language of the statute, as well as its purpose, that electric cooperatives may not deny access to poles where an attachment meets the NESC. The impositions of standards more onerous than the NESC's

²¹ *Supra* notes 9 & 11.

violates the BAA, countermands is core policy imperative, and are unnecessary to address any reasonable safety needs.

45. The Commission's decision on this discrete issue will impact current and future investment in broadband deployment to unserved areas across the state, not only with respect to Charter, but also with respect to all other broadband providers subject to the BAA. Additionally, a definitive ruling reinforcing the BAA's clear terms will prevent other cooperative utilities from taking similarly unlawful positions in pole attachment agreement negotiations and set a clear standard for resolution of future disputes where a pole owner wants to force an attacher to accept a standard that exceeds the requirements of the NESC. Accordingly, the Commission should confirm that pole attachers have a right under the BAA to attach their facilities "to the extent not prohibited by the National Electric Safety Code." S.C. Code Ann. 58-9-3030(A).

PRAYER FOR RELIEF

46. WHEREFORE, Charter respectfully requests that the Commission:

- (1) Confirm that the BAA prohibits electric cooperatives from denying pole access based on construction standards that exceed the NESC; and
- (2) Award Charter any and all additional relief that the Commission deems just and proper.

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Respectfully Submitted,

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